No. 10387

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRIEDRICH WALTER BERGMANN,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

BRIEF OF APPELLANT.

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I.

Statement of Basis of Jurisdiction.

On July 3, 1942 the United States Attorney for the Southern District of California filed a complaint against appellant which alleged that the order of the District Court for the Southern District of California made on April 9, 1937 admitting appellant to citizenship should be revoked and set aside and Certificate of Naturalization No. 4262178 issued to appellant pursuant to said Order should be cancelled because of appellant's alleged fraud and illegal conduct in procuring the same. [R. 4, 5.] Authority for filing said action is found in the provisions of Section 338 of the Nationality Act of 1940, 54 Stat. 1158 [United States Code, Title 8, Section 738; Appendix p. 5].

Judgment in favor of appellee was entered on Nov. 30, 1942. [R. 32.] On Feb. 19, 1943 appellant filed Notice of Appeal. [R. 33.] At the same time appellant filed his STATEMENT OF POINTS [R. 33-36], STIPULATION AND ORDER THAT CLERK MAY SEND EXHIBITS TO CIRCUIT COURT OF APPEALS [R. 37], DESIGNATION OF CONTENTS OF RECORD ON APPEAL [R. 38-39], and CASH BOND ON APPEAL. [R. 39.] Thereafter the record in this case, certified by the clerk of the District Court, was filed with the Clerk of this Honorable Court. [R. 40-41.]

This Honorable Court has jurisdiction to hear this appeal. [United States Code, Title 28, Sections 211, 225, and 230; Sections 116 and 128 of the Judicial Code; Appendix, p. 7].

II.

Statement of Case.

A. Issues Raised by the Pleadings.

The complaint alleged that on Nov. 5, 1936 appellant filed his Petition for Naturalization No. 246-P-52847 in the District Court of the United States for the Southern District of California and that on April 9, 1937 in open court he took the oath of allegiance as required by law. [R. 3.]

With respect to appellant's petition the complaint alleged: (1) that appellant stated therein that he was attached to the principles of the Constitution of the United States; (2) that appellant further stated that he intended to become a citizen of the United States and to renounce allegiance and fidelity to any foreign prince, potentate, state and sovereignty, and particularly to The German

Reich of which at that time he was a subject; and (3) that appellant further stated that it was his intention to reside permanently in the United States. [R. 3.] The complaint alleged that the foregoing representations were false and fraudulent. [R. 4.]

With respect to the oath of allegiance taken by appellant on April 9, 1937, the complaint alleged that appellant swore falsely and fraudulently when he took said oath in that: (1) appellant did not, in fact, renounce and abjure all allegiance and fidelity to the German Reich; (2) that he did not in fact intend to support the Constitution of the United States against all enemies foreign and domestic; and (3) that he did not in fact intend to bear true faith and allegiance to the same, but did intend to remain a subject of the German Reich and to maintain his allegiance thereto. [R. 4-5.]

These alleged misrepresentations, the complaint alleges, induced the District Court to make an order admitting appellant to citizenship. [R. 4.] Certificate of Naturalization No. 4262178 was thereupon issued to appellant by the clerk of the Court. [R. 4.]

The complaint then alleges that appellant procured his Certificate of Naturalization on April 9, 1937 *fraudulently* and *illegally* (emphasis added) and for the purpose of obtaining the rights, privileges and protection of American citizenship without intending to assume the duties thereof; therefore, charges the complaint, appellant's Certificate of Naturalization is subject to cancellation. [R. 5.]

Appellant's answer did not deny the filing of the petition, the taking of the oath of allegiance, and the issuance

of the certificate but did deny each and every charge of misrepresentation, fraud, and illegality alleged in the complaint. [R. 6.]

In addition to the aforesaid denials appellant plead two affirmative defenses. In these affirmative defenses appellant alleged: (1) his departure from Germany in 1911 at the age of seventeen years, his eleven year residence in Canada, and his arrival in the United States in July, 1922; (2) his arrival in Long Beach in 1923 and his continuous residence in said city thereafter, except for trips; (3) his law abiding conduct both in the United States and Canada; (4) that he never returned to Germany after leaving it and that he hoped to visit his mother at the conclusion of the present war, his mother being his sole and only interest in Germany; (5) that he has performed his duties as a citizen to the best of his ability and that he has no allegiance to any government or nation than the United States; (6) that all of his property is located in Los Angeles County; (7) that on Dec. 19, 1941 he purchased a $1,000.00 face value United States Defense Bond, Series E, which represented approximately 15% of his net income for the year 1941, and that it was his intention to thereafter devote a like percentage so long as the need to do so exists; (8) that he is opposed to German militaristic policies and to autocracy and class rule based on birth and to any governmental rule of any kind not based on other than the will of the majority of the people as expressed by free elections; (9) that he believes whole heartedly in the Republic of the United States and its principles as set forth in the Constitution, the Declaration of Independence, the Gettysburg Address, and as expressed by great Americans; (10) his intention to leave

his property to the City of Long Beach and certain specified charitable organizations; and (11) his religious beliefs. [R. 6-13.]

The issues thus presented by the pleadings are: (1) was appellant guilty of fraud as alleged in the complaint?; (2) did appellant in 1937 procure his Certificate of Naturalization fraudulently and illegally?; and (3) was appellant's conduct consistent with his contention that he had in fact renounced all allegiance to the German Reich and had transferred his sole and unreserved allegiance to the United States and was attached to the principles of the Constitution of the United States at the time he took his oath of allegiance on April 9, 1937 and during the five years immediately prior thereto?

B. Issue Tried.

The issue actually tried was the sole issue of fraud. [R. 43.] In his opening statement counsel for appellee stated that the basis of appellee's contention was that appellant was guilty of fraud on two grounds: (1) that at the time appellant took the oath of allegiance he reserved allegiance to the German Reich and (2) that he intended to return to Germany to live permanently. [R. 43.] The trial court accepted this version of the issues ["The proof here is directed to one cause only." R. 271; see, also, R. 284-286, 357-358, 508.]

C. The Findings.

The findings of fact are general. They follow the language of the complaint almost verbatim. They ignore the affirmative defenses. [R. 27-30.] The conclusion of law is that appellant procured his Certificate of Naturalization fraudulently and illegally. [R. 30.]

D. Statement of Facts.

The facts can best be understood by grouping them into the four chronological periods into which they naturally group: (1) the first period—1911 to July 13, 1922; (2) the second period—July 14, 1922 to April 9, 1937; (3) the third period—April 10, 1937 to Dec. 8, 1941; and (4) the fourth period—Dec. 9, 1941 to Nov. 30, 1942.

1. The First Period—1911 to July 13, 1922.

This covers the period between the time of appellant's departure from Germany at the age of 17 years until his arrival at Eastport, Idaho. What occurred in this period is found chiefly in appellant's answer [R. 6-7], Appellee's Exhibit No. 1 [R. 227-230, Application and Petition for Naturalization], and appellant's testimony. [R. 463-476.]

Briefly the foregoing shows that appellant left Germany at the age of 17; that his brother Edmund was his guardian; that he never served in the German army and never intended to; that his education was the equivalent of an American senior high school with some night school training in commercial subjects; that he went to Canada via the Port of New York, where he stayed until he emigrated to the United States in July, 1922; that he registered as an enemy alien in Canada during World War I; that he was law abiding; and that he did not return to Germany.

2. The Second Period—July 14, 1922 to April 9, 1937.

This period covers the time from appellant's arrival in the United States until he took the oath of allegiance on

April 9, 1937, and received his Certificate of Naturalization. Knowledge of this period comes from appellant's answer [R. 8-11], Appellee's Exhibit No. 1 [R. 227-230], three of appellee's witnesses [Haschke, R. 214-220; Barber, R. 221-235, 615-620; Rankin, R. 258-265], and thirteen of appellant's witnesses [Crump, R. 278-292; Horan, R, 301-310; Dungen, R. 310-317; Starks, R. 318-335; Geselman, R. 346-363; Ellis, R. 365-370; Rohrs, R. 384-393; Grant, R. 394-400; Mason, R. 401-406; Kammerer, R. 407-420; Kingman, R. 421-455; Kellegher, R. 458-463; Bergmann, R. 463-608.]

From Eastport, Idaho, the port through which appellant entered the United States, appellant went directly to Spokane, Washington, where his brother Charles lived and was engaged in the fur business. [R. 479.] Appellant's intention in coming to the United States was to acquire citizenship. Both of his brothers, Charles and Edmund, were at that time citizens of the United States. [R. 479.]

In January, 1923 appellant left Spokane, ultimately arriving in Long Beach in March, 1923 where he has resided ever since. [R. 476.] Appellant bought land in Long Beach and improved it. [R. 481.]

Haschke, a retired electrical engineer, stated: (1) that he had lived next door to appellant for 12 years [R. 214]; (2) that perhaps a dozen times in the past 10 or 12 years appellant had raised his *left* hand and said "Heil Hitler" [R. 215]; (3) that five or six or seven years ago some Navy boys were drilling across the street from appellant's property holding maneuvers [R. 215]; while this was going on appellant "pranced around," pounded his

fist on the fence post and said that America would be sorry if she interfered with Germany. [R. 216.]

Barber, district law officer of the Immigration and Naturalization service at Los Angeles, testified: (1) that he took a statement from appellant in Nov. 1936 in connection with appellant's petition for citizenship [R. 221]; he checked appellant's petition for naturalization [R. 222]; question No. 26 was "If necessary, are you willing to take up arms in defense of this country" [R. 230]; appellant answered "Yes" underscoring the answer and the word "defense" in the question [R. 230]; he asked appellant if he had any objections to bearing arms in defense of the United States and appellant answered "No" but that he wouldn't bear arms in an attack upon Germany [R. 224]; Barber asked appellant if he could not take the oath unqualifiedly and he said he couldn't, that he wanted that qualification put in there, so Barber wrote it on the petition in pen and ink [R. 224]; by the time Barber finished checking the rest of the questions appellant said he wanted to withdraw the statement that he would not be willing to take up arms in an attack upon Germany, so Barber ran a line through the statement and crossed it out [R. 225]; Barber discussed appellant's answer to question No. 26 with a Mr. Terrill, whose province it was to pass upon the question of whether or not the case should be submitted to the Court [R. 232]; Barber and Terrill were convinced that appellant was willing to take the oath unqualifiedly [R. 234]; this was on Nov. 5, 1936 [R. 234]; more than 90 days later the certificate of Naturalization was issued. [R. 234.]

Rankin, the third of appellee's witnesses, testified: (1) that he attended the hearing on appellant's petition for

citizenship in April, 1937 [R. 258], and was present at the latter portion of it [R. 259]; that Judge Yankwich (the trial court) conducted the hearing [R. 261]; that appellant told the judge that he had served with the German Army in Turkey [R. 261]; Rankin had known appellant 18 years and he was willing to go to court and testify that he thought appellant was a proper person to be granted citizenship [R. 261]; he did not think he was confused about the name of the judge who conducted the hearing. [R. 263-264.]

Appellant's Witnesses.

Dr. Crump testified: (1) he is a dentist, has lived in Long Beach 22 years, and has three boys in military service [R. 278-279]; he has known appellant fifteen years [R. 279]; he has visited with appellant a good many hundred times. [R. 279.]

Horan testified: (1) he has known appellant since 1923 [R. 302]; his property is across the street from appellant's [R. 302]; appellant told him he intended to leave his property to the Salvation Army and the City of Long Beach, and the Y. M. C. A. [R. 304]; appellant stated that his mother was in Germany and that he sent her money. [R. 304.]

Dungen testified: (1) that he was a next door neighbor of appellant since May, 1923 [R. 310]; that he visited with appellant quite often, both he and appellant being single men [R. 311]; he talked with appellant "lots before" appellant became a citizen [R. 312]; a couple of years before appellant got his citizenship papers appellant told him he wanted to become a citizen [R. 313]; appellant always said that he liked this country [R. 314];

they had more than one conversation about that [R. 314]; that appellant stated he liked the way the laws and everything was in the United States [R. 314]; he liked it better than anywhere else [R. 314]; he said his mother was in Germany and that he would like to see her. [R. 314.]

Starks testified: (1) that she had lived in Long Beach 18 years and had been in the employ of the City Prosecutor's office since 1929 [R. 318]; (2) that she has known appellant for 12 years [R. 318]; (3) that appellant proposed marriage to her in 1932 but that she did not accept his proposal [R. 319]; (4) during 1934 or 1935 she had six or more conversations with appellant on general subjects [R. 321]; (5) appellant stated in 1932 that he left Germany to escape military training. [R. 325.]

Geiselman testified: (1) that he is assistant trust officer of the California Trust Company in Los Angeles, admitted to practice law in California and Nebraska, formerly county attorney for two terms in his home county in Nebraska, and that he served in the Navy during the World War I, having been discharged as an ensign [R. 346-347]; (2) that he met appellant in 1926 in connection with a transaction at the Trust Company [R. 347]; (3) about ten years elapsed before he met appellant again [R. 347]; (4) since 1936 he has visited and conversed with appellant about eight or ten times a year [R. 348]; (5) appellant would compare how liberal our form of government was to the forms of government in Europe where old hatreds of one country against another existed for generations and couldn't be erased [R. 349]; (6) appellant stated that he was gratified to be able to do business with people generally here without any reflection upon him because of his accent [R. 349]; (7) that he could rely

largely upon the honesty of people here in the United States [R. 349]; (8) appellant commented upon the lack of vindictiveness by people because he may or may not have been of their particular race [R. 350]; (9) in appellant's stock and bond purchases he wouldn't have any wherein there was any influence or ownership in Europe. [R. 359.]

Ellis testified: (1) that he has resided 25 years in Long Beach [R. 365]; (2) that he is a licensed real estate broker [R. 365]; (3) that he had known appellant 15 years [R. 366]; (4) that he first met appellant when appellant tried to sell him some palm trees [R. 366]; (5) during the period of their acquaintanceship appellant has never engaged himself in any organization similar to the Nazi Bund or any other un-American organizations. [R. 366, 367.]

Rohrs testified: (1) that he is a city gardener of the City of Long Beach [R. 385]; (2) that he had lived in Long Beach 18 years and is a veteran of World War I [R. 385]; (3) that his acquaintance with appellant started in 1928 [R. 385]; (4) that appellant was interested in plants and trees and used to come through the park where he worked quite often. [R. 385.]

Grant testified: (1) that he is a clerk in a Long Beach bank and has been since Oct. 1925 [R. 394]; (2) that he had known appellant since July, 1932 [R. 394]; (3) that he had business dealings with appellant—trust deed foreclosures—in 1932 and 1934 [R. 395]; (4) he had lunch with appellant at appellant's apartment [R. 395] and had several conversations with appellant, both in the office and in appellant's apartment [R. 396]; (5) one day at appellant's invitation he went to the Los Angeles Museum to

look at appellant's collection, but appellant not being there, Grant did not examine it [R. 397]; (6) in 1932 appellant said that he was going to leave his collection to some museum. [R. 397.]

Dolores Mason testified: (1) that she had lived in Long Beach since 1933 [R. 401]; (2) that she was appellant's neighbor from 1933 to 1937 [R. 401]; (3) that in 1933 or 1934 she told appellant that she was lonesome, resenting the fact that her husband, a Navy man, was away [R. 402, 403]; (4) that appellant replied to her that that wasn't the way to do things—that there was everything in this country if she would just go out and get it—that if she wanted her husband to be proud of her she should do something [R. 403]; (5) in none of her visits did she hear appellant criticize our form of government [R. 405]; (6) in 1936 appellant told her that he wished he could make a park in the neighborhood so that people in that end of town who couldn't afford some of the other things would have at least that much beauty. [R. 406.]

Kammerer testified: (1) that he had lived in Long Beach 23 years, is a family man with 5 children and is a real estate broker working at Calship on the swing shift [R. 407]; (2) his 19 year acquaintanceship with appellant has been both social and business [R.408]; (3) appellant and he had taken Sunday drives at least 50 times [R. 409]; (4) appellant mentioned that he was going to leave his property to the "Y" and Salvation Army, different organizations—some to a few private people [R. 409]; (5) more than once appellant told Kammerer he left Germany on account of getting away from the military [R. 409], probably making the statement in 1926

[R. 410]; (6) in 1936 or 1937 appellant told Kammerer he was going to apply for citizenship papers. [R. 411.]

Kingman testified (by deposition): (1) that he is President of Plomb Tools Contracting Company, a subsidiary of Plomb Tool Company [R. 422]; they do work for the Army Air Force [R. 422]; (2) he has lived in California since 1892 except for 10 years absence in the East [R. 422]; (3) he has known appellant since 1935 [R. 423]; (4) he has seen appellant a great many times since then [R. 424]; (5) he has seen appellant's archelogical collections in the Los Angeles County Museum and has talked with Dr. Bryan, its head [R. 425]; (6) appellant said he was going to leave his collections to the museum [R. 426] and his property to the Salvation Army and Y. M. C. A. [R. 427]; (7) he has never heard appellant make any disloyal statement to this country [R. 428]; (8) he has been in appellant's home more than a hundred times and has never observed any German literature or newspapers in appellant's home [R. 429]; (9) appellant is very frugal [R. 429], very miserly, does his own cooking and eats it alone [R. 430]; (10) in 1935 and 1936 appellant admired Hitler and the youth movement and the progress economically that attended Hitler in Germany [R. 452]; as time went on Hitler's military progress alarmed him that the world might get into another war and that the physical training and youth movement would lead to a lot of disaster. [R. 452.]

Bergmann testified: (1) that he arrived in Long Beach in March, 1923 [R. 476]; (2) he bought land and improved it and thinks he is a very civic minded citizen [R. 481-482]; (3) he recalls his interview with Barber with reference to his application for naturalization [R.

486]; (4) he told Barber he would bear arms against Germany for the United States [R. 487]; (5) he made up his mind right at that time that he would do so, even if he had to fight on German soil [R. 488]; (6) he took the oath of allegiance without any reservation whatsoever [R. 489]; (7) he had never had any contact with Germans in this country or been back to Germany since he left [R. 495]; (8) he had said "Heil Hitler" two or three times in a joking way to Haschke who had said the same thing to him one time. [R. 501.]

3. The Third Period—April 10, 1937 to December 8, 1941.

This covers the period immediately following appellant's admission to citizenship up to and including the declaration of war by the United States on Germany, Italy and Japan.

(a) *Appellee's Witnesses.*

Ernest C. Williams: (1) had one conversation with appellant in April, 1941 [R. 45]; (2) Shields was with him [R. 45]; (3) appellant criticized the administration, that he didn't like Mr. Roosevelt and the Jewish influence in the administration [R. 47]; (4) appellant said he served in the German Army in World War I and had a brother who was then (1941) a submarine instructor in Japan [R. 47]; (5) appellant professed to admire the United States [R. 48]; (6) appellant said Hitler was a very great man and admired his principles [R. 47]; (7) appellant was happy and jolly all afternoon [R. 54]; (8) about an hour before he and Shields left appellant gave the "Heil Hitler" salute [R. 48, 56]; (9) the afternoon was a regular talk fest. [R. 56, 57.]

Shields: Williams was his swamper on the trip. [R. 147.] Since his testimony is substantially the same as Williams it will not be repeated. [R. 147-158.]

Pelliter: (1) she is engaged in the hotel business in Long Beach where she has lived 13 or 14 years [R. 64]; (2) she has known appellant seven years [R. 59]; (3) in April, 1939 she recalled having a conversation with appellant about leasing appellant's property [R. 60]; (4) appellant said he was going away to Germany and might be gone two or three years [R. 60]; (5) appellant said United States bonds were not safe, not to invest in them [R. 61]; (6) appellant said that the German people were more intelligent than the American people—that the American people did not know how to make money [R. 63]; (7) appellant said that the United States was a good place to live but that he didn't want to be buried here. [R. 64.]

Huggins: (1) discussed lend lease with appellant in the fall of 1941 with appellant who said that if he knew that the United States was going to furnish England with materials he didn't know whether he would become a citizen or not [R. 75]; (2) in another conversation about a month later appellant said he thought he would like to go and make a visit to Japan, that the people of Japan were nice people [R. 76]; (3) appellant thought the American people misunderstood Hitler who was a very nice man [R. 78]; (4) early in 1941 Huggins introduced appellant to his mother, Mrs. Duell [R. 78]; (5) appellant spoke first in German and then in French to her [R. 78]; (6) when Mrs. Duell said she couldn't understand him he said "I am a Nazi" [R. 7]; (7) appellant had a smile on his face when he said this [R. 3];

(8) appellant was bitter toward England and said he didn't like for material to be loaned or sold or given to England [R. 85]; (9) that was prior to the United States being involved in the war and at the time he didn't consider appellant's remarks out of the ordinary. [R. 85.]

Mrs. Huggins: She testified that appellant spoke to Mrs. Duell in French and German and then said that he was a Nazi. [R. 171-172.]

Kennedy: (1) has lived in Long Beach 22 years [R. 89]; (2) has known appellant 10 or 15 years [R. 90]; (3) in the fall of 1941 he had a conversation with appellant in the office of the Building Department of Long Beach where Kennedy is assistant building inspector [R. 90]; (4) Vaughan, a plastering inspector, was present [R. 90]; (5) appellant had previously left some pamphlets of a speech (about the time of Lindbergh's and Wheeler's speeches) and came in to see if Kennedy had read it [R. 90]; (6) they were published by America First [R. 91]; (7) the three of them started discussing the war [R. 91]; (8) appellant was asked when he was going back to Germany and he replied "as soon as the war was over" [R. 91]; (9) he said he would stay there [R. 92]; (10) appellant said that he didn't know when the war would be over but "when it comes to the worst, we—Hitler—will use gas" [R. 91]; (11) a short time before this conversation appellant told Kennedy he had been a citizen for two years. [R. 96.]

Vaughan: (1) he is the plastering inspector and had a conversation with appellant in 1941 [R. 211]; (2) appellant had some Lindbergh and Wheeler literature he was passing out [R. 211]; (3) he said the war wouldn't last

another year if the United States stayed out [R. 212]; (4) the reason the war would end so quickly was that "We—Hitler will use gas and wind it up quick" [R. 212.]

J. M. Williams: (1) is a vice president of the Bank of America in Long Beach where he has lived 9 years [R. 173]; (2) in 1940 after the fall of France he had a conversation with appellant in the bank [R. 173]; (3) in answer to Williams' question how the war looked appellant said he thought Hitler would be in London about Sept. 15 and the war would then be over [R. 174]; (4) with the war over Germany would be a clearing house for international trade [R. 175]; (5) appellant stated that the bad impression the people of this country had of Hitler was due to misrepresentation by the press which was controlled by Jews [R. 175]; (6) appellant said he thought Hitler was in reality a good kind Christian gentleman—that he only wanted to do good [R. 175]; (7) Williams wouldn't be too sure that appellant said that Hitler was a good man or whether he said Hitler thought he was a good man. [R. 180.]

Kelgard: (1) he has lived in Long Beach 41 years [R. 97]; (2) he has known appellant in a business way 15 years [R. 97]; (3) late in 1939 he talked with appellant about the war—just before the fall of France [R. 97]; (4) appellant said he felt like going back to Germany and helping whip England [R. 98]; (5) a lot of Long Beach people belonged to America First and a lot of Kelgard's neighbors, native born citizens, took sides one way or the other [R. 99]; (6) at the time appellant's remarks didn't impress Kelgard as being any different from the speeches by Wheeler, Lindbergh and others. [R. 100.]

Thiessen: (1) in August, 1939 someone told her appellant wasn't very patriotic so she went down to "pump" appellant [R. 102]; (2) appellant told her he came here after World War I ended, that he fought in the German Army and wanted to go back and fight 3 years more [R. 102]; (3) in the event he returned to Germany he would not come back but would go to Egypt and look for lost missions [R. 103]; (4) the yard was nice and clean but the furnishings were not kept up. [R. 105, 106.]

Posey: (1) he is retired—he has lived in Long Beach 32 years [R. 110]; (2) he met appellant about 3 years ago [R. 110]; (3) he has had several conversations with appellant [R. 111]; (4) about July, 1940 appellant informed him that Hitler was O. K. [R. 112]; (5) appellant said that if Hitler came to the United States he would show us how to run the Government [R. 113]; (6) one time Posey believes that appellant said that after the war he would go back to the old country and live like a white man. [R. 114.]

Beck: (1) has been an insurance agent for 40 years and a resident of Long Beach for 30 years [R. 122]; (2) he met appellant in 1922 when he was a member of the City Council [R. 123]; (3) appellant was continuously improving his property and wanted the others to join with him in improving their property [R. 123]; (4) in 1936 or 1937 appellant told Beck he had taken out his citizenship papers [R. 124]; (5) in March, 1941 Beck called upon appellant for a subscription to the Y. M. C. A. [R. 124]; (6) appellant criticized the Government because it had given aid to England, that he seemed to hate England, that it made him ashamed of his citizenship [R. 125]; (7) appellant stated that Germany's con-

duct in killing innocent children was no worse than the Treaty of Versailles which provided for the starvation of the German people [R. 125]; (8) on one occasion appellant stated that upon his death he was going to leave certain property of his to the "Y" in Long Beach. [R. 131.]

Coleman: (1) is a jeweler and has lived in Long Beach 19 years [R. 134]; (2) has known appellant 3 or 4 years [R. 134]; (3) in March 1940 appellant told Coleman he had sent $1500 to Germany [R. 135]; (4) he had seen appellant 40 or 50 times and talked to him on most every occasion [R. 142]; (5) appellant disagreed with President Roosevelt's policies, which was opposite to what Coleman felt. [R. 143.]

Kinder: (1) she works in her husband's meat market in Long Beach where she has lived for 18 years [R. 159]; (2) she has known appellant about 2 years [R. 159]; (3) early in 1940 she went to appellant to ask him to rent her an apartment [R. 160]; (4) he told her he was lonely, didn't fit in this country so well and wanted to go back and see his mother [R. 161]; (5) he said he had fought for Germany and if he went back to Germany would do so again [R. 161]; (6) about a year later she talked to him again—she has talked to him many times [R. 162, 163]; (7) appellant stated at this conversation that he was dissatisfied with the political situation; that the Jews were in control of this country and that Hitler had a good plan in regard to the Jews [R. 164]; (8) a good many times she thought to herself that appellant was a German sympathizer [R. 166]; (9) none of the conversations occurred after the United States entered the war. [R. 167.]

Graham: (1) he has been a Long Beach police officer for 14 years [R. 182]; (2) he has known appellant 4 years [R. 182]; (3) the first time appellant mentioned Hitler was in 1940 [R. 182]; (4) he said Hitler was the greatest genius the world had ever known and that he had built the most wonderful military machine the world had ever known and had accomplished many things [R. 183]; (5) in Sept. 1941 he went to see appellant about leasing appellant's property [R. 183] but a lease was not consummated [R. 195]; (6) for a period of about 3 months appellant and Graham discussed "conditions" considerably [R. 184]; (7) appellant criticized the Government and called Roosevelt a dirty double crossing son-of-a-bitch, that he double crossed the German people and sold them out when he passed the Lend Lease Bill to help England [R. 184]; (8) appellant told Graham that he was a Captain in the German Army during World War I and had served in Turkey [R. 185]; (9) if he could lease his property he would leave on a trip about February 1, 1942 and eventually land up somewhere in South Africa [R. 185]; (10) that he took out his citizenship papers as a matter of good business [R. 185]; (11) that he would bless the date when he could tear them up and return to Germany to live like a white man [R. 186]; (12) Graham never made a report of his conversation with appellant to the Long Beach Police Department [R. 203]; (13) in April, 1942 he was questioned by Casey of the FBI. [R. 204.]

(b) *Appellant's Witnesses.*

Crump: (1) previous to Pearl Harbor appellant distributed Nye circulars on the intervention question [R. 281]; (2) appellant was an isolationist [R. 288]; (3) appellant stated that he admired this Government on account of its free institutions. [R. 291.]

Mitchell: (1) in the last 3 years when he delivered mail to appellant the latter received 2 letters only from Germany and they were from appellant's mother [R. 295]; (2) appellant received no deliveries of papers, periodicals or magazines of any kind from Mitchell. [R. 297.]

Horan: (1) appellant told Horan about having become a citizen and that he was very proud of it [R. 303]; (2) appellant said he was glad to be a citizen [R. 308]; (3) appellant said that he liked the American way of shaking hands after an election—in Europe appellant stated that the people didn't get over their pre-election bitterness after the election was over. [R. 309.]

Dungen: (1) when appellant got his citizenship papers he said he was glad [R. 312]; (2) appellant said he liked this country. [R. 313, 314.]

Starks: (1) when the war condition broke out in Europe in 1939 appellant said that he regretted from the bottom of his heart that this condition existed [R. 323]; (2) in the fall of 1940 appellant mentioned that he admired Wheeler and Lindbergh [R. 324]; (3) appellant

told Stark that he had received his citizenship papers, that this was the land of opportunity. [R. 330.]

Miller: (1) her husband is a Navy police officer [R. 337]; (2) she runs a beauty shop and manages apartments [R. 337]; (3) she became acquainted with appellant in Feb. 1938 when she called upon him and brought him some home made biscuits [R. 338]; (4) appellant told Miller in 1939 that he was an American citizen and that he was sure proud of it [R. 339]; (5) appellant stated that he liked our way of government and didn't like dictatorship—he liked to be in a country where he could vote [R. 340]; (6) there were never any German magazines or literature around his apartment. [R. 343.]

Geiselman: (1) in late 1939 or early 1940 appellant stated that he thought Hitler had the right idea about developing the health of the youth of Germany [R. 351]; (2) he thought Hitler was wrong in trying to glorify the military side of the training because it kept alive intense hatreds the different European countries had for each other [R. 351]; (3) he did not think Hitler could be considered a good leader for Germany because he was an Austrian and was "big-headed" [R. 351]; (4) he disliked the class distinctions based upon birth that existed in Europe [R. 352]; (5) appellant told Geiselman that he was a citizen, probably in 1938; (6) he said United States citizens were treated in the South Sea Islands with far more respect than Germans [R. 353]; (7) there were many discussions about appellant's plans with respect to the disposition of his property upon his death, but the plan of disposition remained the same [R. 355]; (8) he intended to give the collections to the Association and Museum and his property to the City of Long Beach,

Y. M. C. A., and Salvation Army [R. 355]; (9) appellant never purchased any stocks and bonds wherein there was any influence or any ownership of the companies in Europe [R. 359]; (10) appellant was bitter about using the German youth in the march into Poland and the other military campaigns. [R. 361.]

Ellis: (1) in the summer of 1941 appellant told Ellis that he had named the Y. M. C. A. and the Salvation Army as beneficiaries in his will [R. 368]; (2) about 2 years ago appellant stated that the United States should be careful and protect its own interests and look after its affairs at home and not take too much of our time or energy trying to help other nations. [R. 369.]

Trammell, Jr.: (1) former city attorney of Long Beach [R. 372]; (2) has known appellant since 1937 [R. 371]; (3) in 1937-1939 appellant told Trammell of his intended disposition of his property upon his death to the Y. M. C. A., etc. [R. 373]: (4) between August and November, 1941, appellant consulted Trammell professionally [R. 372]; (5) he saw appellant 15 or 20 times during that period [R. 373]; (6) in these conversations appellant stated that he was proud of the fact that he was an American citizen [R. 374]; (7) appellant spoke highly of the common people of England but had an antipathy towards the ruling class [R. 379-380]; (8) he said the German Government did get things done but he guessed that after all not getting things done so fast was the price we had to pay for democracy. [R. 375, 380.]

Rohrs: (1) either in 1937 or 1938 he had two visits with appellant [R. 386]; (2) appellant didn't think we had any business with foreign entanglements—we should

mind our own business [R. 388]; (3) appellant told Rohrs of his intended disposition of his property, such as to the Y. M. C. A., the Museum, etc. [R. 389]; (4) appellant had no use for nobility [R. 388]; (5) appellant said he could never go back to Germany because he left Germany to evade military training and he would probably be arrested if he went back [R. 390]; (6) Hitler was never mentioned. [R. 390.]

Grant: About the year 1938 appellant told Grant he was an American citizen. [R. 399.]

Kammerer: (1) in 1938 appellant told him that appellant had received his "last papers" [R. 411]; (2) he was proud he had his papers and was proud he was a citizen of the United States [R. 412]; (3) he said he would rather live here than any place he knew of—it was a wonderful country [R. 412]; (4) the way Wheeler and Lindbergh and "them" people were keeping us out of war was O. K. [R. 415.]

King: (1) about 2 years ago he had a conversation with appellant [R. 457]; (2) appellant said he was in favor of isolation—that we should keep out of foreign entanglements. [R. 457.]

Bergmann: (1) he did not give the "Heil, Hitler" salute to Williams and Shields [R. 484]; (2) he took his oath of allegiance on April 9, 1937 without any reservation whatsoever and still means it [R. 489]; he did not advise Mrs. Pelliter not to buy United States bonds, stating they were not safe [R. 490]; (3) he told her they were good bonds for security but paid a low interest rate —if she wanted good interest to buy industrials [R. 490]; (4) he did not tell her German people were more intelligent than the American [R. 491]; (5) he and Huggins

have had bad blood between them [R. 491]; (6) he told Huggins that Hitler thought he was a Christian man, the same as he said to J. M. Williams [R. 491]; (7) I did smile and in a joking spirit say "I am a Nazi" to Mrs. Duell [R. 493]; (8) he has heard "Heil Hitler" said by good Americans in a spirit of sociability and in a joking way [R. 494]; (9) he has had no contact with German Bunds or activities and does not read German magazines [R. 494]; (10) he has never been back to Germany [R. 496]; (11) he does not admire Hitler's youth movement as he has come to now understand it [R. 507]; (12) he was an isolationist until war occurred [R. 507]; (13) he has never called President Roosevelt a son of a bitch, but differed with his foreign policies prior to December 7, 1941 [R. 511]; (14) he has admired some of President Roosevelt's acts such as his C. C. C. camps [R. 511], and his policies toward the working man [R. 512]; (15) he did not vote in the 1940 Presidential election because he was confused on the issues [R. 513-514]; (16) he never told Graham that he obtained his citizenship papers as a business protection and would bless God when he could tear them up and leave this country [R. 518]; (17) when he talked to Mr. Beck, who spoke of a union with England, he said that he would tear up his citizenship papers if we ever had such a union with dukes, barons, etc. [R. 518]; (18) he did say to Mrs. Thiessen that Germany could do worse than take his money and that was that they could put him in jail for evading military service [R. 545-546]; (19) he did not tell Mr. Posey that if Hitler would come over here he would show us how to run the government [R. 547]; (20) he did tell Posey that he believed a dictatorship was more efficient than a democracy but that he was willing to

pay the price [R. 547]; (21) he did not tell Posey that when the war was over he would return to Germany and live like a white man [R. 547]; (22) ever since January 1937 he has drawn up a holographic will each year carrying out his plan to leave his property to the City of Long Beach, the Y. M. C. A., Salvation Army, Association and Museum [R. 552]: (23) he did not tell Graham that he got his citizenship papers for business reasons [R. 557]; (24) he did not state to Mr. Huggins that if he had known about lend lease he would never have taken out his citizenship papers [R. 562]; (25) he did not tell Graham that Hitler was the greatest living human on the face of the earth [R. 564]: (26) he did not tell Graham, or anyone else, that Hitler was a genius [R. 565]; (27) he did not tell Mrs. Kinder that he wanted to return to Germany to help Hitler win the war [R. 565]; (28) he did not ever refer to himself as "Hitler, Jr." or "Hitler the 2nd"—he has never used those expressions [R. 566]; (29) he never said that if Hitler needed what he had he would give Hitler everything he owned [R. 567]; (30) he did say dictatorship was more efficient than democracy but that he was willing to pay the price for a democracy because in a democracy you get freedom of action. [R. 568]; (31) he has never at any time wanted Hitler and the leaders of the German Reich to set up a dictatorship in the United States [R. 568]; (32) he has never at any time wanted the people of the United States to set up a dictatorship because he has strong republican ideas and has always felt that way [R. 568]; (33) he did oppose the lend lease program but not because it would hamper the conduct of the war by the German Government [R. 569]; (34) he has never served in the German Army and he has never told anyone that he had [R. 596]; (items 22-34 testified to on cross-examination).

4. The Fourth Period—December 9, 1941 to Nov. 30, 1942.

(a) *Appellee's Witnesses.*

Huggins: (1) in the evening a few days after Dec. 7, 1941 appellant said to him that the Japanese "had to do it" [R. 79]; (2) he "supposed" appellant was referring to the attack on Pearl Harbor [R. 80]; (3) Huggins replied to appellant that he did not see why but he does not remember appellant's reply. [R. 88.]

Coleman: (1) he talked with appellant in March, 1942 [R. 135]; (2) he called appellant's attention to a newspaper article in which Roosevelt made a plea to the other countries to be sympathetic and that we should come nearer to prayer [R. 136]; (3) appellant's reply was that this son-of-a-bitch would get his and that this god-damned religion would have to go [R. 136]; (4) when this country was taken over by Germany we could get things regulated, or something in that form, appellant said [R. 137]; (5) in April or June, 1942 he had another conversation with appellant [R. 137]; (6) appellant said the FBI was on his trail but that he could outsmart them [R. 138]; (7) in August, 1942, appellant and Coleman had another conversation in which appellant stated that the FBI had closed in on him and that he was awfully grieved over it; something about his citizenship [R. 138]; (8) appellant went into a great rage, pulled his hair and frothed at the mouth [R. 138]; (9) appellant asked Coleman to make a statement in regard to his character as a citizen but he told appellant he couldn't hardly afford to do that—he told appellant that "you know Mrs. Coleman, she is a teacher here and we can't do that" [R. 139]; (10) while appellant was telling Coleman his troubles

the latter did not remind appellant of some of the things which Coleman claimed appellant had previously said to him [R. 139]; (11) Coleman never expressed any opinion to appellant either of the latter's innocence or guilt of the charge. [R. 141.]

Williams, J. M.: (1) appellant asked if it was true that the sale of war bonds was only half of what it had been in January, 1942—this was in March, April or May, 1942 [R. 176]; (2) appellant seemed disappointed when Williams did not know the answer [R. 176]; (3) appellant was critical of the administration of our government —he thought there was a good deal of corruption [R. 177]; (4) when appellant asked about the sale of bonds there had been some discussion about the market for securities [R. 177]; (5) appellant stated that he was interested in knowing because it might influence his investment attitude and the sale of U. S. defense bonds would be a factor in the general financial picture. [R. 178.]

Graham: (1) in August, 1942 he asked appellant about the contemplated revocation of appellant's citizenship papers to which appellant replied that he did not give a damn, that he had already sent enough securities to Germany to take care of Walter as long as he lived [R. 189]; (2) in September, 1942 appellant asked Graham to be a witness for him [R. 191]; (3) Graham had gone down to ask appellant how the case was proceeding [R. 191]; (4) appellant asked him to forget everything that they had talked about but one thing—that appellant wanted to go back to Germany to see his mother [R. 191]; (5) it was Graham's business if he wanted to see appellant [R. 195]; (6) he went down to ask questions of appellant knowing the cancellation suit was pending [R. 195]; (7)

two, three, or four times he went to see appellant to discuss the case with appellant [R. 198]; (8) he has never tried to borrow money from appellant [R. 198]; (9) in April, 1942 Graham had been questioned by Casey of the FBI. [R. 203.]

Haschke: (1) appellant wanted him to testify for him in this case [R. 216-217]; (2) appellant cried two or three times during the conversation and Haschke was disgusted with him [R. 217]; (3) later on he talked with appellant in the park [R. 217]; (4) in this conversation he reminded appellant of the "Heil Hitler" incidents and of America interfering with Germany in the war [R. 218]; (5) Haschke asked appellant if appellant did not want to buy his property for $8,000 before he went away to the "evacuation" camp [R. 218]; (6) appellant replied that at that time with his troubles he couldn't buy any property [R. 219]; (7) later in the conversation Haschke may have said he would take $7,500 for his property. [R. 220.]

Casey: (1) he is Special Agent with the Federal Bureau of Investigation [R. 235]; (2) he interviewed appellant at his home in Long Beach on May 5, 1942 [R. 235]; (3) Mr. Gibbons, another agent, was with Casey [R. 236]; (4) the interview was reduced to a written statement which appellant signed [R. 239]; (5) the statement is in Casey's handwriting [R. 239]; (6) the statement was made up from notes Casey made [R. 242]; (7) appellant made no objection to having a search made of his premises [R. 243]; (8) the statement is in the record as Government's Exhibit No. 2 [R. 246-254]; (9) he does not recall whether appellant asked him for a copy of the statement. [R. 254.]

(b) *Appellant's Witnesses.*

Crump: (1) appellant said he thought the United States was justified in going to war with Japan [R. 283]; (2) appellant never talked about intervention after Pearl Harbor.

Mitchell: After this case came up Huggins, referring to Bergmann, wanted to know what Mitchell thought of "that damned dutchman." [R. 299.]

Horan: (1) about a week after Pearl Harbor appellant told Horan he was in hopes the United States would soon "clean up" on the Japs and Hitler. [R .315.]

Starks: (1) she saw appellant after service of the suit papers on him and talked with him [R. 333]; (2) on objection of counsel for appellee testimony as to this conversation was not permitted. [R. 333.]

Dolores Mason: (1) in the spring of 1942 she happened to see appellant, whom she had not seen since 1937 [R. 404]; (2) he remembered her [R. 404]; (3) she told him her husband's ship had been torpedoed and that he had been killed in the Battle of Midway [R. 405]; (4) she was very much downhearted [R. 405]; (5) appellant took her by both her arms, didn't say anything just for a minute and then said "Don't be like that, little girl. Get your chin up. That man was fighting for you and if you want to make him proud of you, you get out here, and get yourself a job and out of these dumps." [R. 405.]

Kammerer: (1) after war started appellant changed his mind like everyone else did—he has changed altogether [R. 415]; (2) appellant told him that "we will get rid of those dirty Japs" [R. 415]; (3) appellant has

conversed with Kammerer probably 15, maybe 50 times since January 1, 1942 [R. 416]; (4) he received a letter from appellant's attorney about testifying in the case [R. 417]; (5) appellant talked with Kammerer in August or September, 1942 about testifying in the case but appellant did not tell Kammerer what he wanted him to testify to—he never told him what to say [R. 417]; (6) appellant did not promise him more money than he was making at Cal-Ship to appear as a witness in this case. [R. 418.]

Bergmann: (1) he talked with Haschke in the park and asked him to be a witness [R. 499]; (2) Haschke told appellant he was an exceptional person who could live on air nearly without food [R. 500]; (3) Haschke told him everyone knows he is quite a citizen and what he has done in his neighborhood planting trees and shrubs and filling in the land; (4) "You are loyal and I don't know anything except I remember you said "Heil, Hitler" to me two or three times when you were greeting me when I passed along the fence" [R. 501]; (5) Bergmann said to Haschke that Haschke had similarly greeted Bergmann to which Haschke replied that maybe he did but that he didn't mean it [R. 501]; (6) Haschke said he would be a witness for Bergmann provided the latter would buy his two lots on Santa Clara avenue for $10,000 [R. 502]; (7) Haschke then came down to $8000, then to $7500 [R. 503]; (8) Bergmann refused to make any business deal with Haschke under the circumstances [R. 503-504]; (9) Bergmann differed with President Roosevelt in his policy prior to December 7th, but not after December 7th [R. 511]; (10) he will fight at any time wherever the United States flag flies [R. 545]; (11) Graham came to see appellant in August

and September, 1942 and asked for a loan of $500 [R. 548], but appellant refused the request [R. 549]; (12) he never asked Graham to forget everything he had told Graham except the statement that he wanted to see his mother after the war as Graham claimed [R. 550]; (13) when Graham made these calls on him he did not know that Graham had signed a statement in April, 1942 containing the facts he had testified to in Court [R. 556]; (14) in August, 1942 he did not say to Graham that he didn't give a damn about the naturalization proceedings —that he had been wise enough to send enough securities to Germany to take care of Walter as long as he lives [R. 557]; (15) he never made any such statements [R. 557]; (16) he never had a conversation with Graham about the sinking of two British battleships [R. 586]; (17) the only time he ever said he was a Nazi was to Mrs. Duell, and that was in a joking way [R. 588-589]; (18) he does not know where the two syllables in "Nazi" came from [R. 589]; (19) he believes that the Jews should have a land they can call their own. [R. 592.]

The statement, Government Exhibit No. 2 [R. 246-254]: (20) corrections were made in the statement and then Bergmann signed the statement [R. 533]; (21) appellant was disgusted with the white man for getting into this war—it was due to the failure of statesmen after World War I to so organize the world afterward to keep peaceful nations from being attacked by aggressor nations [R. 556]; (22) the statesmen failed when they did not restrain Mussolini in Ethiopia, the Japanese in Manchuria, and Hitler in Austria and Poland [R. 537]; (23) he is in favor of something on the order of the League of Nations [R. 537]; (24) by "east is east"

and "west is west" he meant that each nation has the right to live its own way as long as it doesn't aggress on the rights of others [R. 430]; (25) each people has a right to its own religion [R. 540]; (26) he would defend the United States wherever the United States flag flies [R. 541]; (27) he does want to see the end of the Hitler regime in Germany [R. 574]; (28) any expansion that Germany does must be by peaceful means, not by aggression [R. 575]; (29) he has never believed in expansion by other than peaceful means [R. 605]; (30) he is opposed to all dictatorship by force or aggression. [R. 605.]

E. The Questions Presented.

A. Did appellant obtain his Certificate of Naturalization on April 9, 1937 by fraud?

B. Did appellant obtain his Certificate of Naturalization on April 9, 1937 illegally?

C. Was appellant upon being granted citizenship thereafter entitled to enjoy all the constitutional rights and privileges of native born citizens?

D. Was appellant entitled to findings on his affirmative defenses?

III.

Statement of Errors Intended to be Urged.

A.

Statement of Points I, II, VII. [R. 28-30, Appendix p. 8.]

The trial court erred in holding that the following representations made by appellant in his petition were false and fraudulent:

1. That appellant was attached to the principles of the Constitution of the United States;

2. That it was appellant's intention to become a citizen of the United States and to renounce and abjure all allegiance and fidelity to any foreign prince, potentate; state and sovereignty, and particularly The German Reich.

B.

Statement of Point VIII. [R. 28-30; Appendix p. 9.]

The trial court erred in holding that appellant swore falsely and fraudulently when he took his oath of allegiance to the United States, in that

1. Appellant did not in fact intend to renounce and abjure all allegiance and fidelity to The German Reich;
2. Appellant did not intend to support the Constitution and laws of the United States against all enemies, foreign and domestic; and
3. Appellant took said oath with mental reservations and for the purpose of evasion.

C.

Statement of Point X. [R. 35; Appendix p. 9.]

The trial court erred in not granting appellant's motion for dismissal at the conclusion of appellee's case in chief.

D.

Statement of Point XI. [R. 35, Appendix, p. 9.]

The trial court erred in not making findings on appellant's first and second affirmative defenses.

ARGUMENT.

POINT I.

The Evidence Is Insufficient to Establish Fraud.

A. The Rule of Construction Which Obtains in a Denaturalization Proceeding Is Different Than in a Naturalization Proceeding.

Naturalization is a privilege. An alien has no inherent right to citizenship. (*Samras v. United States,* 125 F. (2d) 879 (C. C. A. 9th Cir.) Statutory requirements must be complied with, such as knowledge of the English language, good moral character, and attachment to the principles of the Constitution. [U. S. Code, Title 8, Sections 372, 379, 381, 382, 398, 399; Appendix, pp. 1-5.]

In a denaturalization proceeding the Court is examining a final court decree entered after opportunity to be heard. In such a proceeding the law and facts should be construed as far as is reasonably possible in favor of the citizen. (*Schneidermann v. United States,* 87 L. Ed. 1249, 1251.)

> "Citizenship, once bestowed upon proceedings in the federal courts should not lightly be taken away."
>
> *United States v. Woerndle,* 288 Fed. 4749 (C. C. A. 9th Cir.)

> "In suits of such character (fraud) the evidence must be clear, unequivocal, and convincing. United States v. Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384; United States v. Knight (D. C.), 291 F. 129, affirmed (C. C. A.) 299 F. 571."
>
> *Tunlej v. United States,* 31 F. (2d) 696 (8th Cir.), dissent of Judge Booth at p. 699.

The burden of proof is on the Government and this burden must be met with evidence of a clear and convincing character that when citizenship was conferred upon the one from whom it is sought to take it away it was not done in accordance with strict legal requirements. A bare preponderance of the evidence which leaves the issue in doubt is insufficient. (*Schneidermann v. United States,* 87 L. ed. 1249, 1252.)

B. Fraud, to Justify a Court of Equity in Setting Aside a Judgment, Must be Extrinsic.

In general, fraud is deceit, trickery. It is deception deliberately practiced with a view to gaining an unlawful or unfair advantage. (Webster's International Dictionary (1929), p. 863.) As counsel stated in his argument to the trial court, it is "fooling" somebody. [R. 634.] The cases in which fraud has been discussed and defined are legion, as reference to digests and texts will show. (See 17 Words and Phrases, Permanent Edition, pp. 524-588.)

> "Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."
>
> *Moore v. Crawford,* 130 U. S. 122, 128, 32 L. ed. 878, 880, 9 S. Ct. 447.

Not every species of fraud will vitiate a judgment. Intrinsic fraud is not sufficient. It is easier to illustrate than to define; for example, forged documents presented or perjured testimony given in the trial of an action

constitute *intrinsic* fraud. (*Pico v. Cohn,* 91 Cal. 129, 133, 25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537; 15 *Cal. Jur.,* Sec. 123, p. 14.) This type of fraud can not be made the basis of an independent action in equity to set aside a judgment because it can be reached within the original action; if the Court has been mistaken in the law, there is a remedy by writ of error; if the jury has been mistaken in the facts or new evidence has been discovered since the trial, a motion for a new trial is an available remedy and will give appropriate relief. (*United States v. Throckmorton,* 98 U. S. 61, 65, 25 L. ed. 93, 95.)

Only *extrinsic* or *collateral* fraud, practiced by the prevailing party, and which has prevented a fair submission of the controversy, can serve as the basis for vitiating a judgment. Examples of extrinsic fraud are: "Keeping the unsuccessful party away from the court by a false promise of compromise or purposely keeping him in ignorance of the suit; or when an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest." (*Pico v. Cohn, idem; United States v. Throckmorton, idem.*)

> "In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim can be supported in no other way. . . . The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new

trial, and the judgment is affirmed on appeal, he is without remedy." (*Pico v. Cohn,* 91 Cal. 129, 134, 25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537.)

Thus where defendant was not served with process in compliance with the statute and a judgment was entered on such insufficient service and the defendant had no opportunity to defend equity will set the judgment aside. (*Kibbe v. Benson,* 17 Wall. 624, 743, 84 U. S. 741.)

C. The Evidence Is Wholly Insufficient to Establish Extrinsic or Any Fraud of Any Kind.

In the case at bar appellant has assumed that Congress "can constitutionally attach to the exercise of the judicial power under Article III of the Constitution, authority to re-examine a judgment granting a certificate of citizenship after that judgment has become final by exhaustion of the appellate process or by a failure to invoke it." (*Schneidermann v. United States,* 87 L. ed. 1249, 1252.) Appellant's reason for said assumption has not been due to a conviction that authority to so re-examine can constitutionally attach to the judicial power, but the fact that where such re-examinations have been had, the judgments of cancellation have been reviewed on appeal the same as any other judgments. There are many such cases in the reports but in none of the decisions examined by counsel has a case been found where the precise question was both raised and passed upon. (*United States v. Wusterbarth,* 249 F. 908 (D. C., New Jersey); *United States v. Tapolcsanyi,* 32 F. (2d) 385 (D. C., W. D.,

Pennsylvania); *United States v. De Tolna,* 27 F. (2d) 984 (D. C., E. D., New York); *Tunlej v. United States,* 31 F. (2d) 696 (C. C. A., 8th Cir.) *Maney v. United States,* 278 U. S. 17, 73 L. ed. 156.) The point is raised in the *Schneidermann* case but not considered. (87 L. ed. 1252.)

Appellant fully met every statutory requirement; he had lived in the United States more than five years immediately preceding the filing of his petition; he had lived continuously in the United States from the time of filing his petition up to the date of his admission to citizenship; he spoke English; he did not advocate the overthrow of government by force or violence nor was he affiliated with an organization which did; he was not a deserter from the army or navy during war nor a draft evader; he was a person of good moral character, and law abiding; he was attached to the principles of the Constitution of the United States (according to the testimony of representative citizens of his community) and well disposed to its good order and happiness. [U. S. Code, Title, 28, Secs. 372-394; Appendix, pp. 1-5.]

More than ninety days elapsed between the filing of his petition and its hearing in open court. The appellee had the right to appear, cross-examine appellant and his witnesses, to introduce evidence, oppose the petition and appeal from the decision granting appellant naturalization (Act of 1906, Secs. 5, 9, 11; U. S. Code, Title 28, Sec. 399; Appendix, p. 5.]

The evidence shows that the responsible officers of appellee, in charge of naturalization proceedings, had examined and questioned appellant in November, 1936. At that time appellant had gone the extreme limit in frankness. He had expressed his concern about being required to bear arms in an attack upon Germany. To defend the United States in an attack upon it by any nation, including Germany, he was willing to do. But to attack Germany—that, appellant found troublesome to his conscience.

Appellant, being an honest, frank and outspoken man, discussed this situation with appellee's officer who informed appellant that bearing arms included, if necessary, an attack on Germany. Before the interview concluded appellant stated he would bear arms without reservation and his frankness so impressed appellee's examiner, and his superior whose duty it was to finally pass upon naturalization petitions before sending them to the Court, that they approved his petition. Some three months later appellant appeared in open court and took his oath unreservedly.

That was in November, 1936 and April, 1937, respectively. One wonders when appellee charges "fraud" to appellant of what such fraud could possibly consist. Appellant did everything in his power to acquaint appellee with the precise state of his mind and heart. He was almost childlike in his frankness. His conduct is certainly not that of the trickster or deceiver who wanted citizenship for reasons he would not care to disclose. Such a person would have been exceedingly cautious about revealing his inmost thoughts.

Appellee knew all about appellant. Its officials made notes of interviews with appellant. Is appellant, five years later, to be penalized because the judge who admitted him to citizenship was not informed of the November, 1936 interview? What could appellant do about it in April, 1937? Appellee had all the facts; their officers were in charge of the proceedings; appellant complied with every requirement imposed by law; he answered freely and fully every question asked him; when appellant appeared in open court on April 9, 1937 he had done nothing to impose on appellee or the judge or anyone else. There certainly wasn't the slightest *extrinsic* fraud upon which to base an action in equity to set aside the decree admitting appellant to citizenship, a decree which had stood unchallenged for more than five years.

Nor was there intrinsic fraud. There isn't the slightest evidence to support any finding of fraud of any kind. Following appellant's admission to citizenship on April 9, 1937 he returned to his home and continued to live the same law abiding life that had characterized him since his arrival in Long Beach in the Spring of 1923. He stayed in the United States. He did business here. He paid taxes. He improved his own property and worked for neighborhood improvement. When war broke out he bought defense bonds to the amount of 15% of his net income, 5% more than the Government asks of its citizens. At no time after appellant received his Certificate of Naturalization did he evade any duty imposed upon him as a citizen.

POINT II.

The Evidence Is Wholly Insufficient to Establish That Appellant Obtained His Certificate of Naturalization Illegally.

The Court concludes that appellant obtained his Certificate of Naturalization *illegally*. [R. 30.] The findings are so general and so meager that it is difficult to know just what is meant by "illegally".

By a process of elimination the illegality must mean lack of attachment to the principles of the Constitution. This for the reason that any charge of illegality based upon failure to meet other requirements [such as, ability to speak, English, etc.—see Appendix] is patently absurd since the evidence is entirely without conflict on these matters. The opening statement of appellee's counsel also supports this view of what is meant by "illegally" because he stated that the contention of appellee was that appellant reserved allegiance to Germany and intended to return to Germany to live permanently. [R. 43.] The former is certainly a charge of lack of attachment.

In many respects this case is strikingly parallel to the *Schneidermann* case. There the government sought to turn the clock back twelve years; here it is five years. There what the defendant did or said as showing lack of attachment was *after* citizenship was granted; here the same is true. Appellant met every test of required conduct prior to his admission in April, 1937, not only

for the five year period immediately preceding that date, but for fourteen years prior thereto. On the basis of that conduct appellee was satisfied that appellant had met every requirement, including that of attachment, in full.

Now it is sought to re-examine that finding and by acts and utterances *subsequent* to naturalization to ascertain his state of mind on April 9, 1937 and to hold that the finding of attachment then made was erroneous. It must be borne in mind that what appellant did, after he was naturalized, was in the exercise of his rights as a citizen, not as an alien, and his conduct can fairly be judged only on that basis. Further, within two years after appellant became a citizen, great political issues developed in which all citizens, native and foreign born alike, became violent partisans of one side or the other. Political discussion was hot, bitter, and acrimonious, and citizens of both high and low estate in the heat thereof made remarks which offended not only those who differed with them but also the dictates of good taste. Then war came to this country and all sensible people, including appellant, forgot their differences and became unified in the defense of their country.

It is a difficult thing to ascertain the state of mind a person had on a certain date by recourse to what such a person *later* believes or does or says. That is one reason why memoirs written years after the events have occurred are not very trustworthy; the passage of time and the attendant change of perspective unconsciously colors the recitals.

The courts have recognized this as true. Thus where an alien had been admitted to citizenship in 1907, joined the I. W. W. in 1912, fomented strikes in 1917 during World War I, and was convicted of violation of the espionage act in 1918, these acts were held insufficient to justify a judgment of cancellation. The Court said that it was too conjectural to say that the joining of the I. W. W. in 1912, or the conviction in 1918, showed the citizen's state of mind in 1907. (*Rowan v. United States,* 18 F. (2d) 246 (C. C. A. 9th Cir.)

In *United States v. Woerndle,* 288 F. 47 (C. C. A. 9th Cir.) a decree refusing cancellation was upheld where the citizen, an attorney at law, was naturalized in 1904 and when Germany started World War I sympathized with her and was hostile to her enemies, bewailed her misfortunes and reverses, expressed hope for her ultimate victory, criticized the attitude of the administration and the people of the United States for their sympathy with Germany's enemies, but after the United States got into the war outwardly conducted himself as a loyal citizen, bought Liberty Bonds and contributed to the Y. M. C. A. and Red Cross, although his criticism of the President of the United States went "to the extreme limit of permissible criticism." In this case the citizen obtained a passport in his own name for a German Army Captain who desired to return to Germany in order to fight for her. This act was punishable as a felony. Yet the Court says that this act, rep-

rehensible as it was, did not indicate his mental attitude ten years before when he took the oath (pp. 48-49).

Some of these things appellant did, many he did not do. Appellant did criticize the President, he did express hostility to England, and he did oppose intervention; in common with millions of other Americans he was an ardent isolationist. All this he did before the war with no disloyal or criminal act of any kind committed by him. After the war he bought defense bonds and conducted himself as a loyal citizen. At no time did he have any contact with German or German-American activities; he neither joined nor attended German-American lodges, clubs, societies or bunds and he confined his reading to magazines, periodicals, and newspapers published in the English language. He was completely isolated, by his own voluntary act, from anything that was German or German-American, confining his real estate investments to Los Angeles County and his stock and bond purchases to American-owned and controlled companies.

Nothing was thought of it at the time. Police officer Graham, who visited him frequently, made no report of it to his department. He never made an official report to any government agency but did, in April, 1942, almost four months after the war commenced, answer questions asked of him by the Federal Bureau of Investigation.

That's a very good indication of what the officer thought of appellant's state of mind in the years fol-

lowing April 9, 1937. It was not only this officer's opportunity, but his duty, to apprise the law enforcement agency of which he was a member, of any disloyal conduct. It was only after war commenced that anyone gave the matter any thought and then the witch hunt started. Everything appellant had ever said was lifted out of its context and compared with Nazi party views as expressed by Hitler and his associates, whose writings appellant testified he had never read, his knowledge of European affairs having been derived solely from American publications. He said he had never read "Mein Kampf" either in German or English and that he had no sympathy with, and was bitterly opposed to, military aggression by Germany or any other nation. Yet he is blamed for everything these German leaders have said and done—that is to say, he is accused of approving them despite the fact that he testified that he did not approve them.

Certainly the examination and checking done by appellee in 1936 and 1937 resulting in the judicial finding that appellant was attached to the principles of the Constitution of the United States is to be taken as true in preference to a picture built up years later from political arguments appellant had with those who differed with him.

POINT III.

Appellant, After Being Admitted to Citizenship, Had the Constitutional Right to Exercise Freedom of Thought and Speech.

A. This Right Is Guaranteed to All Citizens by the First Amendment.

> "And though all the winds of doctrine were let loose, to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, misdoubt her strength. Let her and falsehood grapple. Whoever knew Truth put to the worse in a free and open encounter." (Milton, Areopagitica.)

The poet has here expressed the spirit of the American Constitution. Justice Holmes (dissenting in *United States v. Schwimmer*, 279 U. S. 644, 73 L. ed. 889, 893) expressed it thus:

> ". . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom of the thought we hate."

It is stated thus by Justice Murphy:

> "The constitutional fathers, fresh from a revolution, did not forge a political straight-jacket for the generations to come. Instead they wrote Article V and the First Amendment, guaranteeing freedom of thought, soon followed." (*Schneidermann v. United States*, 87 L. ed. 1249, 1259.)

At the very first session of Congress under the Constitution it passed a resolution submitting twelve amendments to the Constitution. Two failed of passage, the remaining ten passed and comprise the so-called American Bill of Rights. These amendments were submitted and adopted because many of the states had ratified the Constitution on the tacit understanding that a Bill of Rights would be adopted if they ratified the Constitution. (Norton, the Constitution of the United States, Its Sources and Its Application, pp. 194-197.)

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> *Article I of Articles in Addition To, and Amendment Of, the Constitution of the United States of America.*

The way of the dissenter, religious, political, or otherwise, is always difficult. Time and again non-conformists have been hounded and punished because of their unpopular views. Repressive laws have been passed whose object and purpose was to deny to them a forum for the expression of their views. Uniformly the Courts have struck down these acts. One time it is a religious sect called "Jehovahs' Witnesses"; another time it is the Roman Catholic Church; another time it is the Communist or Anarchist; again it is a German Lutheran group teaching pupils in their schools the German language. (*Murdock v. Pennsylvania,* 87 L. ed. 827, 831, 834; *Jones v. Opelika,* 87 L. ed. 854; *Douglass v. Jeanette,* 87 L. ed.

855; *Martin v. Struthers*, 87 L. ed. 861; *Stromberg v. California*, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; *Pierce v. Society of Sisters of Holy Names*, 268 U. S. 510, 69 L. ed. 1070; *Meyer v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042.)

The ostensible reasons given for repressive legislation are always noble or laudable, such as to keep people from being disturbed in their homes, to protect them from unpatriotic influences, to protect their health. The reasons given are never the real ones—the real ones have their basis in the unwillingness to grant freedom of thought and freedom of speech "for the thought we hate" and to punish those who insist upon exercising their right of free speech for such "hateful" thoughts.

Appellant exercised his right of free thought and free speech. He did so with vigor but probably also with considerable lack of tact. There is no reason why, prior to December 7, 1941, as an American citizen, he could not favor Germany in her war with England and still be a loyal American. Long before the United States became involved in the war citizens freely solicited funds for "Greek Relief", "Bundles for Britain", and the like. That was permissible. Had appellant been partial to England at this period nothing would ever have come of his partisanship. It was the popular side, yet many who favored England to defeat Germany still were opposed to intervention in her behalf by the United States.

Appellant was an ardent isolationist. He had lots of company with millions of Americans, both of high and low estate. He had a right to advocate isolationism. He had a right to deliver isolationist pamphlets. He had a right to criticize the policies and conduct of our govern-

ment and to criticize President Roosevelt. He denies ever making the profane reference to the President attributed to him on two occasions. If he made the statement it was improper and in exceeding bad taste, but it would not justify a cancellation of his citizenship. The isolationist-interventionist campaign was acrimonious, people were aroused, pro and con, by the third term candidacy of the President. These years 1939-1941 were trying years with great political issues engaging the intense interest of the American people.

One member of Congress so far forgot himself as to call the President a maniac. [R. 516.] That was certainly improper and doubtless the one who made it has since regretted the intemperate remark.

The F. B. I. statement (Government's Exhibit No. 2) in no wise furnishes a basis for cancellation. In it appellant expressed views worthy of a more qualified scholar on world affairs. Shall the German people be destroyed at the conclusion of this war? Appellant says not. Shall they, and other people oppressed by dictatorship be helped? The United States Government apparently thinks so because as our military forces conquer these lands the promise of aid and help to their people has been promised and doubtless given.

Has Hitler done any good? Is colonization productive of war? Must there be a world order capable of peaceably solving problems of increasing populations if war is to be prevented? No one knows the complete answers to any of these problems. Appellant gave his frankly and fully and in many of his answers many of us will discover that they are somewhat similar to our own views. To really know the right answers to these perplexing

problems we would be obliged to have more wisdom than any mortal has. History will give us the answer, but none of us now living will be here to get it. There is a job to do now, there are answers to find now, and we hope, by the interchange of conflicting opinions, to find the best possible *present* answers to *present* problems.

Appellant had a right to his opinions—none of them are of a subversive or disloyal nature, but many are now unpopular.

It must not be overlooked that appellant was supported in his contention that he was, and is, a good citizen by representative people. Old time neighbors, a dentist, a former city attorney, a woman widowed by the war, a gardener, and many others, testified to his devotion to American ideals, his civic mindedness, his pride in his citizenship, and his intention to leave his estate to public agencies. They are surely entitled to more credence than the ones who testified against him. Some of them in an acquaintance of ten and fifteen years could recall but a remark or two—and these made between three and four years after he was admitted to citizenship. It is surpassing strange that in these long acquaintanceships these witnesses could recall so little to criticize.

It is impossible to review all of the evidence. To do so would transcend all reasonable limitations on the size of a brief. The evidence has been summarized, to the best of counsel's ability, in what he hopes is a fair, accurate, and complete manner. (Statement of Facts, *infra.*) A review of it will, appellant believes, show that his conduct at all times was proper and consonant with his rights and duties as a citizen.

POINT IV.

Appellant Was Entitled to a Judgment of Dismissal at the Close of Appellee's Case in Chief.

The charge of fraud and illegality was not established at the close of appellee's case in chief. Appellee's officials knew all about appellant's views. He had frankly discussed these with them. There was just the reverse of fraud.

As to lack of attachment all the testimony, except one witness (Haschke) was *after* admission to citizenship. The real test was in the statutory period *prior* to April 9, 1937, the day on which appellant was admitted.

The remarks testified to after appellant became a citizen were legally permissible. He committed no overt act. There was no testimony that appellant was other than law abiding. Appellee had not presented evidence of a clear, unequivocal character—or any at all, in fact—of appellant's lack of attachment to the Constitution of the United States. Appellant was therefore entitled to a dismissal of the action.

POINT V.

Appellant Was Entitled to Findings on His Affirmative Defenses.

It was the duty of the trial court to make complete findings of fact upon all of the issues. (*Blockton Cahaba Coal Co. v. United States,* 24 Fed. (2d) 180; *Ripley v. United States,* 220 U. S. 491. 55 L. ed. 557, and 222 U. S. 144, 56 L. ed. 131.)

The findings in this case are very general. They are but the most general conclusions of ultimate fact.

(*Schneidermann v. United States,* 87 L. ed. 1249, 1256.) Under the peculiar circumstances of this case, where the charge of fraud and illegality were so general, appellant found it necessary to set forth affirmatively his good conduct, his activities both as a resident and citizen, and his political philosophy.

That this was so indicated by the type of some of the evidence that appellee introduced. For example, among other things, there were attempts, all abortive, to prove that (1) appellant intended to live in Germany permanently, (2) that he had sent large sums of money to Germany and (3) that he was a former German officer and had fought for Germany in World War I. The recitals in appellant's affirmative defenses completely negative these, and other, charges, made in the evidence. Appellant was entitled to findings on these defenses in view of the wide field afforded appellee in trying to prove, in 1942, what appellant's state of mind was on April 9, 1937.

Conclusion.

Appellant respectfully submits that the decree cancelling his citizenship should be reversed and appellant restored to his status as a citizen.

Respectfully submitted,

WALHFRED JACOBSON,

Attorney for Appellant.

APPENDIX.

Statutes.

Naturalization Proceedings in General.

United States Code, Title 8:

"§372. Proceedings for naturalization. An alien may be admitted to become a citizen of the United States in the manner indicated under sections 372 to 394 of this title and not otherwise." (June 29, 1906, c. 3592, §4, 34 Stat. 596.)

"§373. Declaration of intention. He shall declare on oath before the clerk of any court authorized to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States and to reside permanently therein, and that he will, before being admitted to citizenship, renounce forever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty, and particularly, by name, to the prince, potentate, State or sovereignty of which the alien may be at the time of admission a citizen or subject. Such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien. No declaration of intention or petition shall be made outside of the office of the clerk of court." (June 29, 1906, c. 3592, §4, 34 Stat. 596; Mar. 4, 1929, c. 683, §1, 45 Stat. 1545.)

"§379. Petition for naturalization; when required to be filed; allegations; verification by citizen witnesses. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which be emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided,* That if he has filed his declaration before June 29, 1906, he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at

the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

As to each period of residence at any place in the county where the petitioner resides at the time of filing his petition, there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such period has been a person of good moral character." (June 29, 1906, c. 3592, §4, 34 Stat. 596; Mar. 2, 1929, c. 536, §6(a), 45 Stat. 1513.)

"§381. Oath renouncing foreign allegiance and to support Constitution and laws. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." (June 29, 1906, c. 3592, §4, 34 Stat. 596.)

"§382. Prerequisites to admission to citizenship; residence; character; attachment to principles of Constitution; proof. No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this section he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by this section during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by section 379 of this title to be included in the petition. If the petitioner has resided in two or more places in such county and for this reason two witnesses cannot be procured to testify as to all such residence, it may be proved by the oral testimony of two such witnesses for each such place of residence, in addition to the affidavits required by section 379 of this title to be included in the petition. At the hearing, residence within the United States but outside the county, and the

other qualifications required by this section during such residence shall be proved either by depositions made before a naturalization examiner or by the oral testimony of at least two such witnesses for each place of residence.

* * * * * * * * *"

(June 29, 1906, c. 3592, §4, 34 Stat. 596; Mar. 2, 1929, c. 536, §6(b), 45 Stat. 1513.)

"§398. Final hearings to be in open court." (June 29, 1906, c. 3592, §9, 34 Stat. 599.)

"§399. The United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings." (June 29, 1906, c. 3592, §11, 34 Stat. 599.)

Denaturalization Proceedings.

"§738. Revocation of naturalization.

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of

revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

(b) * * *

(c) * * *

(d) * * *

(e) * * *

(f) * * *

(g) * * *" (Section 338 of the Nationality Code, Oct. 14, 1940, c. 876, Title I, Subchap. III, §338, 54 Stat. 1158, U. S. Code, Title 8, Sec. 738.)

"§701. Jurisdiction to naturalize.

(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing.....in any state..... The jurisdiction of all the courts herein specified to naturalize persons shall extend only to such persons resident within the respective jurisdiction of such courts.....

(b) * * *

(c) * * *

(d) * * *" (Oct. 14, 1940, c. 876, Title I, Subchap. III, §301, 54 Stat. 1140, U. S. Code, Title 8, Sec. 701.)

Appeals.

"§225. (Judicial Code, section 128, amended.) Appellate Jurisdiction.

(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts.....

* * * * * * * * *

(d) *Circuits in which reviews shall be had.* The review under this section shall be in the following circuit court of appeals: The decisions of a district court of the United States within a State in the circuit court of appeals for the circuit embracing such State.....

* * * * * * * * *"

(U. S. Code, Title 28, Sec. 225.)

"§230. Time for making application for appeal on writ of error. No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree." (U. S. Code, Title 28, Sec. 230; Mar. 3, 1891, c. 517, §11, 26 Stat. 829; Feb. 13, 1925, c. 229, §8[c]. 43 Stat. 940.)

"§211. (Judicial Code, section 116.) Circuits. There shall be ten judicial circuits of the United States, constituted as follows:

* * * * * * * * *

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, Hawaii, and Arizona." (U. S. Code, Title 28, Sec. 211.)

Statement of Points on Which Appellant Intends to Rely on Appeal.

I. That the District Court erred in holding as a matter of law that defendant was guilty of fraud through concealment in obtaining his certificate of naturalization, the evidence being conclusively that defendant made a full and frank disclosure to the naturalization officers.

II. That the District Court erred in holding as a matter of fact that defendant was guilty of concealing his state of mind, the evidence conclusively showing an entire absence of concealment on the part of defendant.

III. That the District Court erred in holding that defendant upheld the cause and governmental philosophies of Germany.

IV. That the District Court erred in attributing to defendant, a man of ordinary education, profound philosophical ideologies and geo-political concepts upon the basis of defendant's statements that the world admired German science and commerce and that he was disappointed at the failure of the Caucasion nations after the last war to create a world order along league of nation's ideas.

V. That the District Court erred in holding that defendant refused to bear arms against Germany.

VI. That the District Court erred in holding that the Court was not fully informed of defendant's answers to questions in his naturalization application, the testimony of a government witness being that the Court had personally questioned defendant prior to the granting of citizenship to defendant.

VII. That the District Court erred in holding that defendant was not in fact attached to the principles of the Constitution of the United States.

VIII. That the District Court erred in holding that defendant swore falsely when he took the oath of renunciation and allegiance.

IX. That the District Court erred in holding that defendant repeatedly protested his allegiance to Germany.

X. That the District Court erred in not granting defendant's motion for dismissal after the conclusion of the plaintiff's case in chief.

XI. That the District Court erred in not making findings on defendant's First and Second affirmative defenses.

XII. That the District Court erred in holding that Certificate of Naturalization No. 4262178 was subject to cancellation and in ordering said certificate cancelled.

XIII. That the findings and conclusions of law and decree of cancellation are not supported by a preponderance of the evidence.

XIV. That defendant was prevented from receiving a fair trial by many circumstances of a prejudicial nature. One such circumstance was that the Court which heard the case had theretofore granted defendant's petition for naturalization and, in doing so, had apparently overlooked certain matters contained in defendant's petition and which matters the Court held established defendant's alleged fraud. Another such circumstance was the identifying of defendant's testimony with speeches and writings of German leaders, with which speeches and writings defendant was not familiar. Another circumstance was the general atmosphere of prejudice toward a person of German descent accused, during war times, of disloyalty to the United States. This condition affected the Court, though probably not consciously. [R. 33-36.]

Testimony of Bruce G. Barber.

(Portion Thereof)

"The Clerk: Please state your name.

The Witness: Bruce G. Barber.

Direct Examination.

By Mr. Dean:

Q. Mr. Barber, what is your occupation? A. I am a district law officer in the Immigration and Naturalization Service, Los Angeles.

Q. How long have you been so associated, Mr. Barber? A. I have been in the service 17 years.

Q. The Immigration and Naturalization Service? A. Yes, sir.

Q. Mr. Barber, your title is district law officer. Is that correct? A. Yes, sir.

Q. And prior to the assumption of your duties as district law officer, has it been your duty to take statements from individuals who petition for citizenship in the United States? A. Yes, it has.

Q. In that connection did you take a statement from the defendant in this case, Friedrich Walter Bergmann? A. Yes, I did.

Q. Do you recall approximately when that statement was taken? A. Yes, it was in November of 1936.

Q. Where was the statement taken, Mr. Barber? A. In the Immigration and Naturalization Service office in Los Angeles.

Mr. Jacobson: Will you give me the date again, please?

The Witness: November, 1936.

Q. What were the circumstances surrounding the hearing or the interview you had at that time? A. At that time Mr. Bergmann appeared with his two witnesses to file his petition for naturalization, and I was the naturalization examiner who took the preliminary statement from him, preliminary to his filing his petition.

Q. You mentioned the term "application." Was that application made on some sort of a document or was it merely verbal? A. The petitioner, or Mr. Bergmann, had filled out a form which is a preliminary petition for naturalization, and that had been submitted to the Service. At the time he came to file his petition, his answers given on that form which are numbered questions were checked by me under oath.

Mr. Dean: I see.

Your Honor, as soon as counsel has had time to examine the document I will present it to Mr. Barber.

Mr. Howser: Thank you, counsel. (Passing document to Mr. Dean.)

Q. By Mr. Dean: Mr. Barber, I show you what appears to be a preliminary form or petition for naturalization, No. 23-29—and the paper is torn so that I can't see the next digit; the finishing two digits being 24 with a stamp on it bearing the date of September 5, 1936, 'Received District Office Los Angeles,' and ask you if you have seen that document before? A. Yes, I have.

Q. Is this the document that you saw at the time Mr. Bergmann appeared for an interview at your office? A. Yes, that is correct.

Q. With respect to the writing in black ink on the first and second pages of the document, do you know in whose handwriting that is?

Mr. Jacobson: Do you want a stipulation, Mr. Dean? That is the petition signed by my client. He said that is the one he signed and filled out.

Unless there is some endorsement by the Government, of course—

Mr. Dean: I think I will bring that out in the course of this questioning. Thank you, Mr. Jacobson.

Mr. Jacobson: All right.

Q. By Mr. Dean: With reference to the handwriting on the first two pages, is that in your handwriting? A. The corrections made are in my handwriting.

Q. Now, directing your attention to Question No. 26 which reads, "If necessary, are you willing to take up arms in defense of this country?" Was the answer to that question given in your presence on this occasion? A. Yes, Mr. Bergmann was asked this question over again.

Q. By you? A. By me.

Q. I see. A. And he—

Q. Why was he asked the question over again? A. Because there appeared some entry there which looked to be 'No' that had been crossed out before the form had been sent in to our office.

Q. In other words, it appeared to you that the question had been answered 'No.' Is that right? A. Yes, that is right.

Q. What followed subsequent to the discovery of 'No' in response to that question? A. When I asked Mr. Bergmann the question, I asked him whether he

had any objections to bearing arms in defense of the United States, and he said, 'No,' he didn't; but he wouldn't bear arms in an attack upon Germany.

I asked him if he could not take the oath unqualifiedly, and he said he couldn't. He said he wanted that qualification put in there, and I wrote the qualification in here in pen and ink.

Q. His qualification? A. Yes. That follows his answer to Question No. 26.

Q. Yes.

The Court: May I see that?

The Witness: Certainly. (Passing document to the Court.)

The Court: All right.

Mr. Dean: Will you read the last answer, please?

The Court: You are going to offer that as it is? Have you a photostat of it, Mr. Dean?

Mr. Dean: I don't have a photostatic copy, no. Do you, Mr. Barber?

The Court: This is very important.

Mr. Dean: May I ask leave to have it photostated after it is offered?

The Court: Yes. This is very important because it is in the handwriting of the person.

Mr. Dean: With leave of the Court, I will have this photostated.

The Court: You had better mark it as an exhibit and withdraw it on substitution of a copy.

Q. By Mr. Dean: Mr. Barber, with reference to that, will you continue to explain what transpired subsequent to your questioning of Mr. Bergmann? A. There

are several questions following Question No. 26, and by the time I had checked off the rest of the questions, Mr. Bergmann then said he wanted to withdraw the statement that he would not be willing to take up arms in an attack upon Germany, so I ran a line through that crossing it out.

Q. Where does that line appear on this document? A. Following Question No. 26.

Q. And above the word 'No'? A. And above the word 'No' following the next sub-question under No. 26.

Q. Did you have any further conversation concerning that question, of that inquiry? A. Yes, I had quite a little conversation with him at that time.

Q. Do you recall what the conversation was at that time? A. I asked him whether or not his objections to bearing arms was based upon a religious idea, or whether it was his love of Germany.

Q. Did he reply to that? A. He said that it would be hard for him to bear arms in an attack upon Germany, but that his objection was not because of any religious scruples.

Mr. Dean: Mr. Jacobson and Mr. Howser, I understand you are willing to stipulate the signature on this document is that of the defendant, Friedrich Walter Bergmann. Is that correct?

Mr. Jacobson: So stipulated.

Mr. Dean: I offer this as Government's first exhibit, Your Honor.

The Clerk: Exhibit 1.

The Court: It may be received."

(The petition referred to was received in evidence and marked Plaintiff's Exhibit No. 1.) [R. 221-226.]

"Cross-Examination

By Mr. Jacobson:

Q. Were there any subsequent interviews between yourself and Mr. Bergmann in connection with his request for naturalization? A. No, there were not; not that I recall." [R. 231.]

"The Court: In whose handwriting is the sentence that is stricken out?

The Witness: That sentence is in my handwriting.

The Court: The word 'yes' is in his handwriting?

The Witness: Yes, that is correct, Your Honor. The word 'yes' was written by the petitioner.

The Court: Then he, or rather, you put in the qualification when he gave it to you?

The Witness: That is right." [R. 617-618.]